IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.518 OF 2001

IN

SUIT NO.579 OF 1971

...

Advance Insurance Co.Ltd. ...Appellant

v/s.

M.S.E.B. ...Respondent

...

Mr.Sachin Shetye i/b Ashok Verma for the Appellant.

Mr.K.H.Mody i/b Little & Co. for the Respondent.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 26TH SEPTEMBER, 2007

P.C.:

1. By this Appeal, the Appellant who is the original Defendant challenges the judgment and decree dated 14-3-2001 passed in S.C.Suit No.579 of 1971. By that judgment and decree, the court directed the Defendant to pay an amount of Rs.1,42,985/- to the Plaintiff with interest at the rate of 6% p.a. from the date of the suit till realisation.

2. At the out set, the learned Counsel appearing for the Appellant submits that though according to him the Plaintiff has not been able to prove its claim and therefore the judgment and decree impugned in the Appeal is liable to be set aside, he is willing to pay an amount of Rs.1,50,000/- to the Plaintiff by monthly installment of Rs.25,000/-, in full and final settlement of the suit claim.

3. This offer was not accepted by the original Plaintiff/Respondent.

4. Therefore, we heard the learned Counsel appearing

for both sides. We find that it is an admitted position that the liability has been fastened on the Defendant because of the guarantee that he had executed. It is also an admitted position that the amount under this guarantee was to become payable after the Plaintiff makes payment to the third party. It is also an admitted position that in the plaint, the Plaintiff had asserted that they have made payment to the third party and therefore they are entitled to receive payment under the guarantee from the Defendant. It is also an admitted position that in the written statement the Defendant denied that the Plaintiff has made payment to the third party and therefore has become entitled to claim the amount from the Defendant. It is also an admitted position that neither the Plaintiff nor the Defendant has led any oral evidence. So far as documentary evidence is concerned, in support of its case that it has made payment to the third party, the Plaintiff relied on a statement of account, which is the statement of account maintained by the Plaintiff and which has been denied by the Defendant. No receipt showing payment made by the Plaintiff to the third party is produced. The learned single Judge in his order has observed that there is no dispute between the parties

that the payment was made by the M.S.E.B. to the third party. After perusing the record, we find that there is no justification for the learned single Judge to record such a finding. We find that the material available on record, in fact, shows to the contrary. Thus we find that there was no justification for the learned single Judge to pass a decree. However, as the Defendant has agreed to pay the amount of Rs.1,50,000/-, in our opinion, following order would meet the ends of justice.

O R D E R

(i) The Appeal filed by the Defendant succeeds and is allowed.

(ii) The judgment and decree impugned in the Appeal are set aside. In its place following decree is passed:

(a) The Appellant is directed to pay the amount of Rs.1,50,000/- to the Plaintiff by monthly installment of Rs.25,000/-.

(b) Payment of installment shall start from October,

2007. Each monthly installment shall be payable on or before 10th of each calender month.

(c) Any two defaults committed by the Appellant in paying the installment shall entitle the Respondent to recover the balance amount in lump-sum.

(iii) Appeal & Notice of Motion No.3047 of 2003 are disposed of.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)